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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 368

RISS & COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

In compliance with Paragraph 1 of Rule 12 of the Supreme Court of the United States, Riss & Company, Inc., submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain the jurisdiction are Sections 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C., Title 28, Sec. 345) and Section 210 of the Judicial

Code (38 Stat. 220, 28 U. S. C. 47a) and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * *."

B. The Statute of the United States, a construction of which is involved herein, is the Act of August 9, 1935, 54 Stat. 923, 919 and 924; 49 U. S. C. Sections 306 (a), also known as Section 206 (a) of the Motor Carriers Act of 1935, containing the following provisions:

> Section 206 (a), as amended June 29, 1938; and September 18, 1940, 49 U. S. C. 306; 54 Stat. L. 923, prohibits operation by a common carrier by motor vehicle unless it has first received a certificate of public convenience and necessity. It also provides that if any such carrier or its predecessor in interest was in bona fide operation on July 1, 1935 "and has so operated since that time * * * except * * * as to interruptions of services from which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public conveniences and necessity will be served by such operation, * * *,"

C. The decree sought to be reviewed was entered on June 23, 1943, and the petition for appeal was presented to the District Court on August 13, 1943.

D. This action grows out of the Motor Carriers Act of 1935, Interstate Commerce Act, Part II, 49 U. S. C. 301 et seq., under which the Interstate Commerce Commission, on June 1, 1935, assumed jurisdiction of all motor trucking

companies engaged in transporting merchandise from state to state.

By the provisions of the Act, those motor carriers who have been in operation prior to the enactment were entitled to be granted a certificate of continue in business without any showing other than prior operations and these rights were commonly known as "Grandfather Rights." In its report (Sooner Distributing Company, Inc., Common Carrier Application, 22 M. C. C. 541) which appellant assailed in the District Court the Interstate Commerce Commission found that the Sooner Distributing Company, Inc., appellant's predecessor in interest, had qualified in every respect for such a certificate by virtue of its operations up to and including June 29, 1937, at which time there was an interruption of service, the events leading up to which are as follows:

An application for a certificate of public convenience and necessity having been seasonably filed by Sooner Distributing Company, Inc., with the Interstate Commerce Commission, it was set for hearing which was held on April 9 and May 6 and 7, and on August 13, 1937, the examiner recommended that Sooner Distributing Company, Inc. be granted a certificate of public convenience and necessity under the so-called "grandfather" clause. Petitions were filed on September 20 and 30, 1937, by certain rail and motor carrier protestants stating that subsequent to the hearing the Sooner Distributing Company, Inc. had become insolvent, had been in bankruptcy proceedings and had ceased operations, and requesting a further hearing respecting such matters. At this time Riss & Company, Inc., the appellant, having purchased the operating rights of the applicant, intervened and participated in the further hearing, which was subsequently held.

The Commission found, and such findings are accepted by the appellant, that on May 12, 1937, the Sooner Distribut-

ing Company, Inc. filed a petition with the United States District Court for the Northern District of Oklahoma stating that some of its motor vehicles had been attached in Missouri because of its inability to pay certain salaries. An allegation of insolvency was made, and it was prayed that it be reorganized under Section 77 (b) of the Bankruptcy Act. On the same day an order was entered approving the petition and continuing the applicant in possession of its property, and ordering the return of all property which had previously been attached. On June 3, 1937, the Court issued an order appointing two trustees to take possession of the debtor's estate and continue the operation of the business and to submit within thirty days a plan of reorganization.

On June 21, 1937, the cotrustees petitioned the court stating (1) that the business was being conducted at a loss; (2) that the debtor was bankrupt; (3) that no plan of reorganization had been submitted and that it was improbable that any such plan acceptable to interested parties could be offered; and (4) that there was no chance of raising sufficient working capital to permit debtor to operate with any reasonable hope for success in its business. The petition prayed for an order liquidating the debtor's estate.

On June 29, 1937, the debtor was adjudged bankrupt and the matter was referred to a referee in bankruptcy, and the business was ordered to be discontinued forthwith, and the trustees were ordered to assemble all of the movable property. An interruption of service occurred on June 29, 1937, but, as the Commission found, there had been continuous operation from a time prior to June 1, 1935 to June 29, 1937.

On July 8, 1937, application was made by the trustees to the referee in bankruptcy for an order setting a date for the sale of all certificates and permits which had been issued to the applicant. July 16, 1937, was set as the date of the sale; the highest bid received on that date was $10,000.00,

which was rejected upon the recommendation of the trustees and protests of the principal creditors. Riss & Company, Inc., then offered $17,500.00 which was accepted, and on July 20, 1937, the property was conveyed to Riss for said amount.

Riss & Company, Inc. subsequently applied to the Interstate Commerce Commission for approval of the purchase of the rights, but action on this application was delayed until the determination by the Commission of the "grandfather" rights of Sooner Distributing Company, Inc., which were determined by the order which was assailed by the appellant in the District Court.

Exceptions were seasonably filed to the said report and thereafter on April 6, 1940, Division 5 of the Interstate Commerce Commission denied the application on the grounds that there had been an interruption of service within the control of the applicant and that all "grandfather" rights were lost thereafter.

A petition for re-argument and re-consideration of the application before the entire Interstate Commerce Commission was seasonably filed in November, 1940.

E. The questions presented are substantial and of great importance to numerous motor carriers whose "grandfather" rights to certificates have not as yet been determined. The District Court's decision in this case approves the application of the so-called "Gregg-principle" to facts which are quite different from those in the *Gregg* case (316 U. S. 74). This opens the way for the Interstate Commerce Commission to apply a harsh rule of law in such a way as to destroy rights wherever there has been a bankruptcy proceeding accompanied by any interruption of service by a motor carrier, regardless of the reason for the interruption. It is believed that the *Gregg* case neither requires nor sanctions such a result and that a determination to that effect is in the public interest.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

United States v. *N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50;
Lubetich v. *United States*, 315 U. S. 57;
Gregg Cartage & Storage Company v. *United States*, 316 U. S. 74;
United States v. *Maher*, 307 U. S. 148.

Respectfully submitted,

H. D. Driscoll,
1025 Connecticut Ave.,
Washington, D. C.,
Counsel for Appellants.
H. Russell Bishop,
1025 Connecticut Ave.,
Washington, D. C.,
Counsel for Appellants.

FINAL DECREE.

This cause having come on for trial on the 23rd day of June, 1943, and having been submitted upon the pleadings, without the introduction of any evidence by either party, and argument of counsel for plaintiff and defendants having been heard, and the court being of opinion that the case is indistinguishable upon the law and the facts from the case of *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, and under the authority thereof should be dismissed,

It Is Therefore Ordered, Adjudged and Decreed that the complaint in the above styled case be and the same hereby is dismissed at the cost of the plaintiff.

ALFRED P. MURRAH,
United States Circuit Judge;
ROYCE H. SAVAGE,
United States District Judge;
STEPHEN S. CHANDLER, JR.,
United States District Judge.

Endorsed: Filed Jun. 23, 1943. H. P. Warfield, Clerk, U. S. District Court.

Recorded: J 6—P. 401.